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COMPARATIVE LEGAL ANALYSIS ON THE VIABILITY OF JUDICIAL MANAGEMENT ON INSOLVENT RESIDENTIAL DEVELOPER COMPANIES IN MALAYSIA, THE REPUBLIC OF SINGAPORE AND THE UNITED KINGDOM

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Recently, the Corporate Law Reform Committee ('CLRC') operating under the Companies Commission of Malaysia ('CCM') has recommended that judicial management ('JM') be introduced in Malaysia as one of the ways to deal with corporate insolvency matters. The application for appointment of judicial manager may be made by the company itself, the directors or the creditors. The judicial manager is armed with a moratorium power against any action taken which may be commenced by the creditors and others to ensure that he can effectively carry out his duty. The moratorium power will enable him to prepare and implement the approved restructuring plan for the benefits of the insolvent company and its creditors. This paper aims to elaborate the CLRC's recommendations on JM and study its strengths and weaknesses particularly in dealing with the problems of failed residential projects of insolvent residential developer companies. This paper also is a result of research conducted through a comparative legal research methodology. Two jurisdictions, viz the Republic of Singapore and the United Kingdom, have been selected for comparative analysis over their respective laws and practices on JM. Further, this comparative study is to investigate, identify and find the respective jurisdictions' strengths and weaknesses on JM, which Malaysia can learn from particularly in the face of the failed residential projects' problems. This paper finds that the recommendation by the CLRC for the appointment of judicial manager is

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commendable. Nonetheless, it is submitted that, in the insolvency management of insolvent residential developer companies with failed residential projects, the judicial manager who is armed with certain statutory and legal powers still cannot fully provide comprehensive solution in dealing with the rehabilitation of failed residential projects and cater to the rights of the aggrieved purchasers. Equally, this paper suggests certain proposals to improve the corporate rehabilitation mechanism carried out by the judicial manager in insolvency Administration involving insolvent residential developer companies whose residential projects failed. In the course of carrying the JM, this paper also suggests certain ideas on how to protect the rights and interests of the aggrieved purchasers in failed residential projects.

Keywords: *Failed Residential Projects; Judicial Management (JM); Rights of Aggrieved Purchasers; Rehabilitation; Malaysia.*

INTRODUCTION

If a company is unable to pay its debts, it may be subject to various insolvency proceedings on the application of the stakeholders especially the creditors. The purpose of the insolvency approach is for the insolvency administrator and manager to take over the affairs of the debtor company in order to settle the debts of the creditors and distribute the insolvency proceeds to the rightful persons according to the law and equity.

There are many types of insolvency approaches in Malaysia. The most popular ones are: liquidation, receivership and Scheme of Arrangement ('SOA'). The newly introduced insolvency methods by Corporate Law Reform Committee ('CLRC') are the Corporate Voluntary Arrangement ('CVA') and the Judicial Management ('JM').

CLRC is headed by Dato' KC Vohrah. Its members consist of 25 persons from various backgrounds such as Advocate & Solicitors, representatives from the Companies Commission of Malaysia ('CCM'), Securities Commission ('SC'), Bursa Malaysia Securities Bhd, Prime Minister's Department, Attorney General Chambers ('AGC'), Insolvency Department, company secretaries, chartered accountants and academics. CLRC is also supported by several working groups' members and a secretariat. CLRC has conducted a research into the current provisions under the Companies Act 1965 ('the CA') since December 2003 which took about four years to complete. The result is the final report of the CLRC (Companies Commission of Malaysia, 2011).

For the purpose of this paper, only JM, being one of the innovative insolvency methods that have been proposed by CLRC, which will be discussed in respect of its ability to deal with issue in failed residential projects

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and its rehabilitation. The author will look into this matter by way of comparison between the legal position in Malaysia, the Republic of Singapore and the United Kingdom. The purpose of this comparative analysis is to find out the strengths and lessons that Malaysia can learn from Singapore and the UK's JM Law to improve the proposed Malaysian JM legal framework that can adequately deal with the issues arising from failed residential projects.

PROBLEM STATEMENT

It is an undisputed fact that failed residential projects are negative phenomena that have plagued the residential industry in Malaysia. The issue of failed residential projects began with the adoption of a residential democracy by the Malaysian Government in the 1960s. Prior to the 1960s, public residential projects were provided by the government itself. However, due to insufficient government funds and the upsurges in demand of residential ownership and needs, the government opened the door for private residential developers to participate in providing public residential accommodation to the citizens. This policy was supported by aggressive government assistance, incentives and legal means to ensure its success. Despite such efforts, the occurrences of failed residential projects have marred the role of private residential developers towards national development and safeguarding the interests of its citizen purchasers. As a result, many purchasers have become victims of failed residential projects. Hitherto, there are still inadequate preventive and curative measures to protect the rights and interests of the aggrieved purchasers in failed residential projects.

There are various reasons causing failed residential projects. The consequential problems they have caused are also grave. One of the reasons is that there are insufficient legal provisions and protection to avoid and prevent the occurrences of failed residential projects and to protect the interests of purchasers. In the event that rehabilitation can be carried out, the ensuing problems have caused pecuniary and non-pecuniary losses to purchasers. The problems are still left hanging and unsettled for most of the purchasers and stakeholders, without any sufficient remedies and measures to address them.

Some quarters say that the current residential policy and industry in Malaysia is still healthy, notwithstanding the plight of purchasers of failed residential projects, poor building workmanship, late delivery of vacant

possession, escalating residential prices and other residential problems. 'The problem of failed residential projects only represents 1-3% of the total residential projects'. 'The remaining 97%-99% of residential projects succeeds'. 'Thus, the current concept of residential delivery and policies should be continued regardless of the plaguing occurrences of failed residential

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projects and their negative consequences befalling the purchasers' (Hassan & Tala, personal communication, 13 August 2010).

Unfortunately, these are some of the statements made by persons in authority in the Malaysia's residential industry. Despite these statements, there are still inadequate measures taken by the government to alleviate and eliminate the problems of failed residential projects, not even the current and newly established Division of Rehabilitation of Abandoned Projects under the Department of National Residential, Ministry of Residential and Local Government ('MHLG'), the recent amendments made to the Residential Development (Control and Licensing) Act 1966 (Act 118) and the recent recommendations by PEMUDAH (the Special Task Force to Facilitate Business). The measures taken are still 'too little too late' in the face of the catastrophe caused by failed residential projects. The fallen preys are the aggrieved purchasers themselves. The law governing the residential industry in Malaysia -- the Housing Development (Control and Licensing) Act 1966 and its regulations (Act 118) is evidently unable to fully address the problems of failed residential projects. The court also seems indecisive in protecting the interests of the aggrieved purchasers. This is partly due to 'too many conflicting considerations and equities' that the court needs to deal with in cases involving failed residential projects. Thus, in certain circumstances, the rights and interests of the purchasers may not be fully appreciated and taken into consideration by the court. The problem becomes more severe where residential developer company is subject to the insolvency Administration. In the insolvency Administration, the insolvent ailing company becomes bankrupt and all the assets and moneys will be used to settle off the debts of the creditors and other rightful parties. There may be insufficient monetary balance left by the ailing insolvent residential developer companies which can be used to rehabilitate the failed residential projects and to compensate the aggrieved purchasers and other victim stakeholders (Md Dahlan, 2009).

Among the reasons leading to the occurrences of failed residential projects in Malaysia, are:

- (a) insufficient terms and conditions in the residential loan agreement (including the Islamic Banking Home Financing Schemes *Bay' Bithaman al-Ajil* ('BBA'), *Istisna'*, *Ijarah Thamma al-Bay'*, Commodity *Murabahah* and *Musharakah al-Mutanaqisah*) effected by the purchaser/borrower and the end-financiers to finance the purchase of the residential unit of the purchaser/borrower against any possible grievances consequent to abandonment of residential projects (Md Dahlan, 2009);
- (b) insufficient coordination between the land Administration, planning, building, housing authorities, and other technical agencies in respect of the approval for the alienation of land, conversion of land uses, subdivision of lands, planning permission, building/infrastructure plans' approval, housing developers' licenses and issuance of the Certificate of Fitness for Occupation (CF) and Certificate of Completion and Compliance (CCC), as the case may be; and,
- (c) the developers' blatant disregard of the laws, throughout the course of development of the residential projects. These laws are the Housing Development (Control and Licensing) Act 1966 ('Act 118') and its regulations made thereunder, the Street, Drainage and Building Act 1974 ('SDBA'), the Uniform Building By-Laws 1984 ('UBBL'), and the planning and building guidelines issued by the planning authority and the building authority (Md Dahlan, 2009; Md Dahlan, 2014).

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There are various grievances and problems faced by the purchasers, when the residential development projects are abandoned. For examples, the purchasers' grievances are:

- (a) the purchasers are unable to get vacant possession of the units on time as promised by the vendor developers;
- (b) the construction of the houses are terminated or partly completed resulting in unsuitable

- (c) occupation conditions, mostly for a long time, unless the units can expeditiously be revived; in the course of the abandonment of the project, purchasers still have to bear all and keep up the monthly installments of the residential loans repayable to their respective end-financiers failing which the purchased lots being the security for the residential loan would be sold off and with the possibility of the borrower purchasers be made bankrupts by their lender bank;
- (d) further, as the purported purchased unit has been abandoned and cannot be occupied, purchasers have to rent other premises, thus adding up their monthly expenses;
- (e) inability of the purchasers to revoke the sale and purchase agreements and claim the return of all the purchase moneys paid to the developers as the developer might have no monetary provisions at all to meet the claims or absconded;
- (f) many problems and difficulties happen in the attempts to rehabilitate the abandoned residential units. The problems are because the projects may have been long overdue without any prospects of revival and to rehabilitate them, additional costs and expenditure on part of the purchasers are needed; and
- (g) possible difficulties for reaching consensus and for getting cooperation

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from purchasers, defaulting abandoned housing developers, end-financiers, bridging loan financiers, contractors, consultants, technical agencies, local authority, land authority, state authority and planning authority for rehabilitating the projects. The troubles may be due to the technical and legal problems faced in the attempt to rehabilitate the projects (Md Dahlan, 2009; Md Dahlan 2014).

RESEARCH QUESTIONS

The research questions for this paper are:

- (a) whether the rights and interests of the purchasers, in the failed residential projects of the insolvent residential developer companies which are subject to the proposed JM Administration are fully protected;
- (b) if the purchasers' rights and interests are not protected, how could the proposed JM be improved and improvised for the benefits and protection of the purchasers' rights and interests?;
- (c) what are the terms and laws in the insolvency approach that are applicable in the United Kingdom's Administration and the Singapore's JM in dealing with the problems of failed residential projects?; and
- (d) whether the terms and laws in the UK's Administration and the Singapore's JM can provide adequate protection to aggrieved purchasers in failed residential projects?

OBJECTIVES OF THE PAPER

- (a) to study the rights and interests of the purchasers in failed residential projects whose residential developer companies are subject to Judicial Management Administration;
- (b) to study the proposed legal provisions of the Judicial Management as recommended by the CLRC insofar as these provisions can deal with the problems of failed residential projects and its rehabilitation;
- (c) to suggest certain legal provisions to improve the proposed Judicial Management provisions to sufficiently be able to deal with the problems of failed residential projects and its rehabilitation and protect the rights and interests of the stakeholders particularly the purchasers; and
- (d) to analyse the terms and laws as enforced in the Administration in the UK and the Judicial Management in Singapore in dealing with the insolvent residential developer companies whose residential projects failed.

SIGNIFICANCE OF RESEARCH

It is opined that this paper will be beneficial to purchasers in the failed residential projects and the government regulatory bodies in Malaysia on residential industry and insolvency matters by highlighting the problems that they may face in dealing with insolvent residential developer companies which are subject to the Judicial Management Administration. Certain proposed recommendations are also provided in this paper for consideration of these stakeholders to adopt for the betterment of the proposed Judicial Management legal framework and facilitate the due Administration and rehabilitation of failed residential projects in Malaysia.

LITERATURE REVIEW

There is yet, any official, legal or judicial definition on the meaning of 'failed residential project' in Malaysia. There is inadequate legal literature and research as far as the situation in Peninsular Malaysia is concerned, that have been seriously undertaken to study the problem (Md Dahlan, 2009; Md Dahlan, 2014). Be that as it may, the practical current definition, for the purposes of facilitation and Administration, has been given by the Rehabilitation of Abandoned Housing Unit, under the Department of National Housing of the MUWHLG is as follows (E-Home, Portal Rasmi Jabatan Perumahan Negara, 2013):

- (a) a residential project which is not completed within or beyond prescribed period of the sale and purchase agreement and there is not obvious activities on the site project for six months consecutively; or,
- (b) petition to wind up the housing developer company has been filed at the High Court pursuant to s 218 of the Companies Act 1965; or,
- (c) the developer company is put under the control of the receiver and manager; or,
- (d) the developers admit in writing to the housing controller that they are unable to complete their projects; and,
- (e) the project is endorsed as a failed residential project by the Minister of Urban Wellbeing, Housing and Local Government pursuant to s 11(1)(c) of the Housing Development (Control and Licensing) Act 1966 (Act 118).

However, based on the new proposed definition, a residential project in Malaysia can be deemed to have been abandoned (failed), if the housing developer has refused to carry out or delays or suspends or ceases housing development work continuously for a period of six months or more or beyond

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the stipulated period of completion as agreed under the sale and purchase agreement. This definition is pursuant to the proposed amendment vide s 9(2) of the Housing Development (Control and Licensing) (amendment) Act 2012 (Act A1415).

JUDICIAL MANAGEMENT

According to the CLRC, a qualified insolvency practitioner/qualified independent person should be appointed as the judicial manager of the insolvent company for the purpose of restructuring the rehabilitation scheme of the insolvent company. To undertake this duty, the judicial manager shall be provided with a moratorium against any prejudicial action that may affect his duty in carrying out the rehabilitation scheme of the insolvent companies for the benefits of the creditors. The powers and rights of this proposed judicial management is substantially akin to the powers and rights of Administration in the United Kingdom (UK) and Judicial Management in the Republic of Singapore.

Among the recommendations of the CLRC in respect of the proposed Judicial Management (JM) are as follows (Companies Commission of Malaysia, Review of the CA -- Final Report, 2011; A Consultative Document (1) Reviewing the Corporate Insolvency Regime, 2012 ('The Review of the CA')):

- (1) The court should be empowered to make a JM order in relation to a company if it is satisfied that the company is or will be unable to pay its debts and it considers that the making of the

order would be likely to:

- (a) achieve the company's survival on the whole or in part; and
- (b) enable a more advantageous realisation of the company's assets than in winding up (recommendation 4.18 of the Review of the CA -- Final Report ('Review')).

- (2) The judicial manager must be armed with a moratorium power to enable him to prepare the rehabilitation plan without any potential threat of a winding up of the company or any court action by the creditors which may likely frustrate the judicial management process (recommendation 4.22 of the Review).
- (3) The judicial manager should be given 180 days to table a proposal to creditors, and where appropriate the court should be entitled to give an extension of time to the judicial manager to do so, but the maximum duration of the moratorium should be one year after the order appointing the judicial manager is made (recommendation 4.24 of the Review).
- (4) Any secured creditor should be given a right to oppose the petition for

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a judicial management order. However, once the judicial management order has been made the secured creditor should not be permitted to realise their security and the judicial manager should have the power to deal with the charged property of the company as if the property were not subject to the security. There should also be an express statutory provision stating that once the proposal is approved, it shall be binding on all creditors of the company whether or not they have voted in favour of the proposal (recommendation 4.29 of the Review).

- (5) The creditors should be able to bring an action for relief against oppressive conduct if the court is satisfied that the company's affairs, property or business are being or have been managed by the judicial manager in a manner which is or was unfairly prejudicial to the interests of its creditors or members generally or of some part of its creditors or members (recommendation 4.31 of the Review).
- (6) The judicial management order should be discharged in the following situations:
 - (a) if the proposal has not been approved by the requisite majority in the creditors' meeting and where the court orders the discharge of the judicial manager. The court should be entitled by order to discharge the judicial management order and make such consequential provision as it thinks fit, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit;
 - (b) if the purpose of the judicial management has been successfully achieved;
 - (c) if the judicial manager is of the view that the purpose of judicial management is unachievable; and
 - (d) if the judicial manager applies for a discharge, or is no longer qualified to be a judicial manager or is removed from office, unless the court makes an order replacing the existing judicial manager (recommendation 4.32 of the Review).

Whether judicial management is suitable to be used to facilitate rehabilitation of failed residential projects and protect the purchasers' rights in Malaysia?

In the author's opinion, if the majority or the requisite number of creditors agreed that a JM be carried out in order to ensure rehabilitation of the failed residential projects of the insolvent residential developer companies, the JM can be used to actualise the purported rehabilitation. Nonetheless, if the available funds to finance the rehabilitation are inadequate and that there are many complications and problems in the failed residential projects that carries the risks of jeopardising the creditors' rights and interests, it is opined, that a

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JM may not be the best insolvency method to rehabilitate the projects and protect the rights and interests of the purchasers.

It is opined, in order to ensure that the rehabilitation can be effectively carried out; it is proposed that the Malaysian government should introduce the Residential Development Insurance which should be imposed on all the applicant developers before residential developer's licenses are issued. This insurance can be

used as a financial support in case the appointed rehabilitating party has a shortage of funds or where the available funds are inadequate. Further, a special law governing rehabilitation of failed residential projects is warranted to ensure that the rehabilitation Administration can be executed smoothly and would protect the rights and interests all the related parties in the project. This law should be incorporated in the Housing Development (Control and Licensing) Act 1966 (Act 118).

In the author's opinion, besides the above suggestions, the Malaysian government should adopt 'full build then sell' of residential delivery concept to guard against any occurrences of failed residential projects and its problematic consequences. Through this concept, it is believed that this concept can eliminate altogether the problems and occurrences of failed residential projects in Malaysia.

ADMINISTRATION IN THE UNITED KINGDOM

In the UK, it is opined, the same *modus operandi* that JM operates is called 'Administration'. In Administration, the affairs and business of the insolvent ailing company is put into the control of an appointed administrator. With the enforcement of the Enterprise Act 2002 ('the EA'), the appointment of administrator can be made either by the debenture holders, the creditors of the insolvent company or the company itself or the directors of the insolvency company, either through the court or out of court. A company cannot usually enter Administration if the company is in Administration already, is in liquidation or is subject to an effective administrative receivership (para 39 of Schedule B1 of the United Kingdom's Insolvency Act 1986 ('the UKIA')).

The availability of Administration came into being on the concern that if the insolvent company has no floating charge, created through the deed of debenture, administrative receiver cannot be appointed.

The purpose of Administration is to deal with the assets and manage the business of the insolvent company, to settle or pay off all the debts of the creditors as well as to improve the position of the company's creditors. In a nutshell, Administration is an insolvency measure to rescue the ailing insolvent

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company and facilitate a rescue culture for business (Keay & Walton, 2003; *Hammonds (a firm) v Pro-Fit USA Ltd*[2007] EWHC 1998 (Ch) 1[2008] 2 BCLC 159).

According to para 3(1) of Schedule B1 of the UKIA, the purposes of Administration are to:

- (a) rescue the company as a going concern; or
- (b) achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in Administration); or
- (c) realise property in order to make a distribution to one or more secured or preferential creditors.

An administrator's general duty is to perform his functions in the interests of the company's creditors as a whole (para 3(2) of Schedule B1 of the UKIA) and to perform his functions as quickly and efficiently and as is reasonably practicable (para 4 of Schedule B1 of the UKIA).

The administrator's plans may involve the proposed rescue of the company by way of a company voluntary arrangement (CVA) or may involve the realisation of the company's assets in a more ordered and beneficial manner than could be achieved in a winding up. In carrying out this duty, the administrator is armed with a moratorium. This moratorium prevents any action by any creditors against the conducts of the administrator in order to ensure that the debt settlement process is done smoothly unless with the consent of the court or the administrator (Keay & Walton, 2003). The privilege is also to allow the administrator time and space to put together a package to ameliorate the company's financial position. Nonetheless the moratorium can be lifted on the agreement of the administrator or the court (*Re Atlantic Computer Systems plc*[1992] Ch 505 and *The Environment Agency v Clark (as Administrator of Rhondda Waste Disposal Ltd)*[2001] Ch 57).

If the company rescue is not possible, the administrator may in turn dispose of the business as a going concern and, thus, save the economic unit of the business. The administrator may find that the best that can be achieved is by way of a disposal of the company's assets which at least he can obtain a better price for the assets of the insolvent company than would be achieved on an immediate winding up. After the sale, the

company, by that point, can be an empty shell and thus can be wound up (Keay & Walton, 2003).

If the administrators think that rescuing the company is not reasonably practicable, or that the objective contained within para 3(1)(b) of Schedule B1 of the UKIA would not achieve a better result for the creditors as a whole, then

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the administrators may not attempt to rescue the company. Company rescue is usually not an easy objective to achieve. The time and expense involved in transforming a company around may not be viable and practicable, especially where a simple sale of business to a buyer could be made quickly and relatively cheaply. There is likely to be more proceeds left for the creditors if a quick sale can be done, rather than if the company undertakes a long and expensive rescue package (Keay & Walton, 2003).

If the administrator believes that none the objectives in para 3(1)(a) or (b) of the UKIA is reasonably practicable, he may carry out his functions with the purpose listed in para 3(1)(c) of the UKIA instead. This would be so if there was clearly only enough money in the company to pay some of the secured or preferential creditors. In such a scenario, owing a duty to act in the interests of the company's creditors as a whole would be a nonsense, as unsecured creditors would have no interest in the result of the Administration. If this is the case, the administrator must act in such a way that does not unnecessarily harm the interests of the creditors (para 3(4)(b) of Schedule B1 of the UKIA).

The administrator's job is to put together some proposals in an attempt to satisfy one of the three statutory purposes under paragraph 3(1) of Schedule B1 of the UKIA. Under para 49 of Schedule B1 of the UKIA, a statement of proposals is sent, as soon as is reasonably practicable after the appointment, to the Registrar of Companies and to the company's creditors and members. The statement must explain why, if this is the conclusion the administrator has reached, the administrator thinks that neither of the purposes mentioned in para 3(1)(a) and (b) of the UKIA (company rescue or a better deal for the creditors generally than an immediate winding up would achieve) can be achieved. If a rescue seems reasonably practicable the statement may include a proposal for a company voluntary arrangement (CVA) (under Part 1 of the UKIA) or a scheme of arrangement (under s 425 of the Companies Act 1965).

It is observed that Administration as practised in the UK is creditor-centric. This is clearly evident even in s 27(1)(a) of the UKIA, where the creditors and members of the insolvent company are given a right to take action against the administrator if proven that the administrator is acting in a manner which is unfairly prejudicial to the interests of its creditors or members generally, or of some part of its creditors or members (including at least himself). The court if satisfied with the application may make such order as it thinks fit for giving relief in respect of the matters complained of, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit (s 27(1)(b) of the UKIA). The court order may include termination of the said administrator.

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Thus the rights of the purchasers, customers, shareholders and other stakeholders in the Administration may be marginalised and set aside for the benefits of the creditors and the members. There are some scholars who have criticised this position, in that the establishment of Administration is not only just to rescue the company as a going concern but should also protect the interests of the larger stakeholders including, in the opinion of the author, the customer purchasers in failed residential projects. They premised this idea on s 8(3)(a) of the UKIA itself, which provides that an Administration order can be made for the purpose, inter alia, of the survival of the company and the whole or any part of its undertaking as a going concern (Finch, 2002; *Re Rowbothan Baxter Ltd* [1990] BCC 113).

If a residential developer company in the UK is insolvent and terminated its residential development project, on the application of the appropriate parties (creditors, directors or debenture holders or the company itself), the administrator may rescue the company including to rehabilitate the failed project left by the company. Nonetheless, this (rehabilitation of failed residential project) may not be possible if the moneys are not sufficient and if there are many complications to the project resulting in the rehabilitation of the project not being viable and is detrimental to the creditors' interests, thus leaving the purchasers aggrieved without obtaining adequate remedies. However, it is submitted that, the problem of inadequacy of funds can be

lessened if there is a residential development insurance/home warranty insurance subscribed by the purchaser or the vendor-developer to cover any cost to revive the failed residential projects.

The administrator must as soon as he takes office take control of the company's property (para 67 of Schedule B1 of the UKIA). The administrator shall use his statutory powers to manage the company in accordance with any proposals which have been approved to in the creditors' meeting or according to any directions of the court (para 68 of Schedule B1 of the UKIA).

If a creditor or member can show that the administrator is acting or proposes to act in a way which unfairly harms the interests of the creditor or member, the administrator may apply to the court. An application may also be made by a creditor or member if the administrator is not performing his functions as quickly or efficiently as is reasonably practicable (para 74 of Schedule B1 of the UKIA). The court has a wide discretion in terms of the type of order it may make if the ground for the applications is made out. In particular, the court may regulate the administrator's exercise of his functions, may require the administrator to do or not to do a specified thing, order a creditor's meeting to be called, or provide for the administrator's appointment to cease (Keay & Walton, 2003).

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Hence it is clear that the protection of the interests of the creditors is the paramount duty of the administrator. In failed residential projects in the UK, in the author's opinion, the aggrieved purchasers can apply to the court (for lifting the moratorium of the administrator) compelling the administrator and the company to carry out rehabilitation. However if this application is not agreeable by the creditors and members on the ground that the rehabilitation is not viable and would be detrimental to their interests, the purchasers rights and interests may be affected. Nonetheless, the author is of the opinion that the purchasers can invoke equity and contractual terms emanating from the contract of sale executed between the insolvent residential developer company and the purchasers to compel the administrator and the company to carry out rehabilitation and pay equitable damages. The issue of shortage of funds to finance the rehabilitation may not pose a problem as in the UK it is a normal practice that substantial majority of the residential development projects are covered by residential development insurance/home warranty insurance.

Residential delivery concept in the UK

There are two types of residential delivery concept in the UK. Firstly, 'full build then sell' concept. Under this concept, the developer will construct the residential units until duly completion and once completed, only are these units sold to purchasers. Secondly, in the UK there is 'buying new homes off plan' or 'selling off plan' concept of residential development. Under this concept, the purchasers are required to pay 10% of the purchase price, the balance 90% shall be paid on the completion of the house (Healys's, 2011). Thirdly, under the 'buying new homes off plan', the vendor-developers may obtain a residential insurance/home warranty insurance. If in case the construction of the house is abandoned or stopped mid-stream or the developer becomes bankrupt thus terminating the construction of the project, the insurance coverage may be utilised to finance the completion or rehabilitation of the failed units. Nonetheless there is no statutory standard sale and purchase agreement governing residential purchase in the UK. The terms and conditions in the contract of sale of house are dependent on the prudence of the vendor and purchasers or their solicitors. Thus if the vendor-developer or the purchaser do not possess residential insurance/home warranty insurance, and abandonment occurs, the purchaser will become the aggrieved party. However, pursuant to cll 7.5.1, 7.5.2 and 7.5.3 of the Standard Conditions of Sales (Fifth Ed) (National Conditions of Sale 25th Ed, Law Society's Conditions of Sale 2011) if the seller (vendor developer) fails to complete in accordance with a notice to complete (ie abandons the construction of the house), the buyer may rescind the residential contract, and is entitle to the return of the deposit with accrued interest and that the buyer retains his other

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rights and remedies against the defaulting seller (vendor developer) (Standard Conditions Of Sale (Fifth Ed), 2011).

As mentioned earlier, there is no legislation in the United Kingdom making residential development insurance/home warranties compulsory, and there are no statutory builder registration procedures. However, the non-statutory 'Buildmark' residential development insurance scheme run by the National House and

Building Council ('NHBC'), a private association, covers approximately 90% of new homes built for sale. This insurance covers major defects and against the insolvency of the builder, ie when the residential projects are failed, this insurance can cover the cost of rehabilitation (National House Building Council, 2012).

The two major providers of building warranty inspection and insurance for new homes and residential developments are the NHBC and Zurich Municipal Insurance. The Federation for Master Builders also provides a scheme, but it is used mainly for alterations and additions rather than new builds. The NHBC is the non-government setter and inspector of standards for the new home industry in the United Kingdom. In 1985, NHBC became an approved inspector under the Building Act 1985 and in 1997 the licence was derestricted to cover any developments in the United Kingdom. The NHBC also provides a regulatory concept which works by registering house builders. Over 18,000 house builders who construct approximately 85% of the new homes built each year in the UK are registered with the NHBC. Builders who apply for registration undergo a technical and financial vetting concept and approximately 10% of applications are rejected as a result. Non-compliance with NHBC Rules or Standards can lead to investigation and ultimately deletion from the Register (Grant Thornton Mason Hayes+Curran, 2008).

JM IN THE REPUBLIC OF SINGAPORE

In the Republic of Singapore, a similar method of rescuing the insolvent company is available as the method operated by Administration in the United Kingdom. However in Singapore, this method is called Judicial Management (JM). JM is a method of rescuing the insolvent company in Singapore by way of court's appointment of judicial manager either on the application by the creditors or the company itself. The purpose of JM is to take over the affairs and business of the ailing company and maximise the rescue/rehabilitation process of the insolvent company in the most advantageous, efficient and practical ways and for the benefits of the creditors, including the unsecured creditors, without having to go through the process of liquidation which lacks certain favourable/advantageous characteristics. According to GP Selvam J in *Re Genesis Technologies International (S) Pte Ltd*[1994] 3 SLR 390 (HC) at p 391:

2 MLJ xx at xxxv

Judicial management is an alternative to winding up because, as long as a judicial management order is in force, no resolution may be passed or order made for the winding up of a company. Its primary objective is to give the company a new lease of life as a going concern. It is, therefore, a device to save the company from creditors who may wish to destroy the company when it can be rehabilitated for the benefit not only of the shareholders but the unsecured creditors as well. (Emphasis added.)

In order to execute the judicial manager's duties and exercise his powers in the JM smoothly and efficiently, he is armed with a moratorium (s 227D(4) of the Singapore Companies Act ('the SCA')). This power will shield him from any actions commenced by any parties including the creditors (*Electro Magnetic (S) Ltd (under Judicial Management) v Development Bank of Singapore*[1994] 1 SLR 734).

On application for the appointment of judicial manager, apart from being satisfied that the company is insolvent and unable to pay its debts (s 227B(1)(a) of the SCA), the court must also be satisfied that the order sought will be likely to achieve one of the following purposes (s 227B(1)(b) of the SCA):

- (a) the survival of the company, or the whole or part of its undertaking as a going concern;
- (b) the approval under s 210 of the SCA in respect of a compromise or scheme of arrangement; and
- (c) a more advantageous realisation of the company's assets than would be effected on a winding up.

Nevertheless the court will always be vigilant in order to grant or not the application for JM so that only genuine applications can be allowed to proceed. Otherwise, some unscrupulous parties may apply and abuse this mode of insolvency for their own self-interest. For example unauthorised motives may involve: to stave off a compulsory winding up or prevent execution being levied against the company's property as a ruse by the company to buy time (Han, 2009). A creditor may apply to have the application be struck out either on the basis that the requirements of s 227A of the SCA (the inability of the company to pay its debts

or that rehabilitation of the company is appropriate) are not satisfied or pursuant to the court's inherent jurisdiction to prevent abuse of process.

In *Re Genesis Technologies Pte Ltd*[1994] 3 SLR 390 (HC) the court held that it should be vigilant to ensure that judicial management is not used by directors or shareholders to the detriment of the creditors. The motive for an application for judicial management should be honourable. In this case, the applicant company failed to credibly demonstrate how it had got into its present difficulties and how the situation was to be improved. The applicant

2 MLJ xx at xxxvi

company also failed to make out the grounds on which the petition was founded. Due to this, the application for judicial management by the applicant company was dismissed by the court.

No guidelines are given to assist the court in determining when to exercise its discretion to make a JM order. Maybe, some kind of consideration is emphasised ie the balance of inconvenience test will be used, or that the court should take into consideration the interests of the public, the company, the members, the consumer purchasers and the creditors before deciding whether or not to make such an order. In this respect, it should be noted that the JM order is used primarily to protect the company from its creditors. The making of such an order is an inroad into the rights of the creditor, who have a right to be paid what is due to them when it is due. A JM order should be made only if it can be shown on a balance of probabilities that the making of the order would achieve one of the purposes set out in s 227B(1) of the SCA and that no irreparable injury and damage would be caused to the creditors by the issuance of the order. According to Chak Sek Keong J in *Re Cosmotron Electronics (Singapore) Pte Ltd*[1989] 2 MLJ 11 (HC), if the purposes sought to be achieved by the company in JM can similarly be achieved by the creditors in some other way without any detriment to the company or its shareholders, the company would not have made out a valid case for JM. Thus, if the rehabilitation of failed residential projects may rescue the insolvent company and can pay off the debts of the company to the creditors, according to this case (*Re Cosmotron*), the company may proceed to do so without having to use JM.

It should be noted that the provision in the SCA only provides a right to the creditors to oppose the nomination of certain persons to become judicial manager, not a right to oppose the making of a JM order (s 227B(3)(c) of the SCA read together with reg 35(1) of the Singapore Company Regulations).

The court in Singapore may not make a JM order under the following circumstances:

- (1) if the company has already gone into liquidation (s 227B(7)(a) of the SCA);
- (2) if the company is a bank, a finance company or an insurance company (s 227B(7)(b)(c) of the SCA); and
- (3) if a receiver and manager has been or will be appointed (s 227B(9) of the SCA).

However, notwithstanding these prohibitions, the court has a power to appoint a judicial manager if some overriding public interest requires it, despite the foregoing prohibitions or that it may not be satisfied that the making of the

2 MLJ xx at xxxvii

order would be likely to achieve one or more of the purposes set out in s 227B (1) (s 227B(10(a)) of the SCA and *Re Cosmotron Electronics (Singapore) Pte Ltd*[1989] 2 MLJ 11 (HC).

It may be argued that a judicial manager is required to undertake rehabilitation of failed residential projects in Singapore as a means to serve public interest (purchasers' interests) and try to maximise the rehabilitation process to serve the interests of the creditors. Nevertheless, the court faces troubles in ascertaining the equilibrium of balancing the interests of the public and that of the creditors'. In other words, whether the public interests (for instance the aggrieved purchasers in failed residential projects) should prevail over the interests of the creditors in the course of JM Administration and if the public interest prevails, how can the interests of the creditors can equally be protected? Thus, in carrying out JM, an emphasis on the public interests may not be the paramount concern of the judicial manager. Additionally, some of the reasons, not to concern public interest in carrying out JM by the judicial manager, are: this (rehabilitation of failed residential projects being a way to protect and serve the public interest) may not be appropriate bearing in

mind of the penalties in costs (s 227B(9) of the SCA) which the unsuccessful applicant has to bear and the difficulty of establishing a qualifying public interest, what more if the rehabilitation can prejudice the interests of the creditors?

On the making of a JM order the board of directors becomes *functus officio*. Their functions and powers are vested in the judicial manager, except that he does not have to call meetings (s 227G(2) of the SCA).

Civil proceedings may not be commenced against a company in JM. Existing actions are stayed. Execution and distress may not be commenced or continued against the company's property. In effect, the company has immunity from legal proceedings, unless the leave of the judicial manager or the court is obtained (s 227D(4)(c) of the SCA). Similarly, no winding up order can be made nor can it be resolved to wind up the company (s 227D(1(b) of the SCA).

The company's immunity from any legal actions only lasts as long as the JM order remains in force. Unless it is otherwise discharged, a JM order remains in force for 180 days from the date of the order (s 227B(8) of the SCA). The order may be extended by the court on the application of the judicial manager (s 227B(8) of the SCA) on some reasonable grounds.

Thus, it is opined, in the case of the failed residential project whose residential developer company is insolvent and subject to a JM order, it is possible to revive the project. One of the conditions is this: that the proposal by

2 MLJ xx at xxxviii

the judicial manager to revive the project is approved by the creditors. If the proposal is declined, the court may order that the JM order be discharged (s 227N(4) of the SCA). If the creditors or the members think that they had been treated unfairly or prejudicially, because of the proposal or the effects of the proposal to revive the failed residential project, they may petition to the court pursuant to s 227R of the SCA. The court has wide powers to make such orders as it deems fit to give relief in respect of the matters complained of (s 227R(2) of the SCA).

It should also be noted that the JM may also be discharged if the judicial manager thinks that the purposes of the JM order cannot be achieved (s 227Q(1) of the SCA). Hence, if in the opinion of the judicial manager that it is not possible to revive the failed residential project, due to many complications, leading to the conclusion that the JM indispensably also cannot serve the intended purpose (rehabilitation of the company in the interest of the creditors), the JM order may be discharged on the application of the judicial manager.

Residential delivery concept in Singapore

It is submitted also that, the position of aggrieved purchasers in failed residential projects of the insolvent residential developer companies in the Republic of Singapore is similar to the position in Malaysia. However in Singapore, 80% of the public residential projects are carried out by the Housing and Development Board (HDB) a public and statutory body applying the 'full build then sell' concept of residential delivery. Thus, in this respect there would be no failed residential projects detrimental to the purchasers' interests in Singapore. Only 20% of the public residential development projects are carried out by private residential developers using 'full sell then build' concept of residential delivery. It is opined that failed residential projects can also happen in Singapore by these private residential developers.

CONCLUSIONS AND RECOMMENDATIONS

To recapitulate, the following are the salient points emanating from the above discussion:

- (1) It is opined that if failed residential projects occurred in the Republic of Singapore, the insolvency approaches -- JM law and practice may not also fully protect the interests of the purchasers for instance, for enabling rehabilitation of failed residential projects terminated and left by the insolvent ailing residential developer companies. This is because

2 MLJ xx at xxxix

JM serves to protect the interests of the creditors ie they are creditors-centric, not the customers' and purchasers';

- (2) However, the problem of failed residential projects in Singapore to a degree is eliminated as the government developer -- HDB implements 'full build then sell' concept of residential delivery. The total residential project undertaken by HDB in Singapore represents 80% of the whole residential projects in Singapore. The remaining 20% projects are undertaken by the private residential developers applying 'full sell then build' concept of residential delivery. Thus, as an opinion, failed residential projects may also occur in Singapore and the problems as faced in Malaysia may likewise be faced by the aggrieved purchasers in Singapore;
- (3) It is opined that if failed residential projects occurred in the UK, the Administration insolvency approach may not also fully protect the interests of the purchasers for instance, for enabling rehabilitation of failed residential projects left by the insolvent ailing residential developer companies. This is because Administration serves to protect the interests of the creditors ie they are also creditors-centric, not customers' and purchasers'. Nonetheless, the problem of failed residential projects in the UK is resolved by the concept of residential delivery that is applicable there. They apply 'full build then sell' and 'buying new homes off plan' or 'selling off plan' concepts of residential development. Under the two latter concepts, the purchasers are required to pay 10% of the purchase price, the balance 90% shall be paid on the completion of the house. The purchasers in the substantial majority of residential development projects are also protected with the residential development insurance subscribed by the residential developer companies and/or the purchasers themselves to cover them against any problems if abandonment occurs. Thus the aggrieved purchaser can apply to the Administrator or the court to compel the Administrator to carry out rehabilitation of failed residential projects supported by the residential development insurance fund and/or to pay damages/compensations on the ground of contract and equity as enshrined in the terms of the contract of sale executed between the insolvent residential developer company and the purchasers; and
- (4) It is opined, provided that the insolvent residential developer company has in possession of residential development insurance, the aggrieved purchasers in failed residential projects in the UK may be marginalised and their failed residential projects may be stalled forever without any rehabilitation and they may not get compensation and damages through Administration;
- (5) It is opined that bearing on the above discussion, the position in the UK is better than the position in Malaysia and Singapore in dealing with the
- 2 MLJ xx at xl*
- problems of failed residential projects and in protection of the aggrieved purchasers; and
- (6) In order to improve the position of the above three countries -- Malaysia, Singapore and the UK in facing the problems of failed residential projects, the respective governments should adopt the following suggestions, viz:
- (a) Impose the 'full build then and sell' concept of residential delivery on all residential developers to carry out all residential development projects;
 - (b) Except in the UK, if the concept of 'full sell then build' is to resume in Malaysia and Singapore, the Malaysia and Singapore governments should introduce residential development insurance be imposed on the applicant residential developers before residential developer licenses can be granted. The purpose of this insurance is to cover any shortfall in the funds and any other costs for carrying out rehabilitation of failed residential projects and protect the rights and interests of the aggrieved purchasers; and
 - (c) The government of Malaysia, Singapore and the UK should introduce regulations governing rehabilitation of failed residential projects in order to protect the interests and rights of the aggrieved purchasers in the course of rehabilitation. This suggestion is to ensure that the rehabilitation Administration can be done smoothly and can duly protect the interests and rights of all stakeholders, particularly the aggrieved purchasers.

2 MLJ xx at xli

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